LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 30 1972
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 70-300

---

NEZ PERCE TRIBE OF INDIANS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION OF UNITED STATES

---

CHARLES A. HOBBS
*Attorney for the Petitioner*

WILKINSON, CRAGUN & BARKER
DONALD C. GORMLEY
*Of Counsel*

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 70-300

---

NEZ PERCE TRIBE OF INDIANS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

## REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION OF UNITED STATES

---

Petitioner agrees with respondent that the United States generally is not liable for interest on claims against it, unless the Constitution or Congress expressly directs otherwise, and that this general rule has been held to be applicable to the claims of Indian tribes (Br..4-5).

The sole question here is whether or not Congress authorized the payment of interest in this case. Respondent contends a lack of statutory authority for the payment of interest and cites *Peoria Tribe* v. *United States*, 390 U.S. 468, as a case embodying application of the principle, with a result favorable to the Indians. Respondent, however, fails to recognize that the Indian Claims Commission Act is as much the statutory basis for the award of interest made by the Indian Claims Commission to the Nez Perce Indians as was their 1894 agreement with the United States.

The pertinent provisions of that Act read:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: . . . (3) *claims which would result if the* treaties, contracts, and *agreements between the claimant and the United States were revised on the ground of* fraud, duress, *unconscionable consideration,* mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity. . . ." (Act of August 13, 1946, 60 Stat. 1049; 25 U.S.C. § 70a; emphasis added.)

The power granted to the Commission by that language is unlimited in rendering a judgment in a claim based upon a Commission "revision" of the basic agreement. There is nothing that even hints an award by the Commission based on a revision cannot include a sum of money reflecting the Commission's determination of what the award should be in light of its revision, whether that sum is denominated interest or some other term.

The only limitation on the quantum of relief the Commission may award is found in the third paragraph of § 70a of 25 U.S.C., which provides that in determining relief, the Commission shall make certain appropriate deductions for payments made by the United States on the claim and for all other offsets, counterclaims and demands which would be allowable in a suit brought in the Court of Claims. In addition, the Commission may consider gratuities expended for the benefit of the claimant, and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimants in good conscience warrants said action, it may set off all or a part of such expenditures against any award made on the claim (25 U.S.C. § 70a).

The Commission was established by Congress to right the historical wrongs perpetuated against the Indians in the taking of their property. Its discretion under § 70a to revise agreements is unfettered. Congress lodged the power with the Commission. Should the Commission conclude that on the facts a revision of an agreement should be made, its decision is not subject to review by any court. Review by the Court of Claims may be had of the factual determination underlying the Commission's exercise of its discretion, but absent a reversal of the factual holding or legal conclusions which support the Commission's discretionary action, that action must be affirmed.[1]

The pertinent review provisions read:

> ". . . On said appeal the Court [of Claims] shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting 'fair and honorable dealings', where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. . . .
>
> "(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28." (25 U.S.C. § 70s.)

---

[1] This is the only case in which the Commission has exercised its discretion in this manner since the Commission was created by Congress in 1946.

The Commission, having reviewed the evidence and having determined that the Nez Perce Tribe received an unconscionable consideration for its land under the 1894 agreement, exercised its discretion to base an award upon that agreement, as if the agreement were revised, with the revision to take into account the nature of the original terms of the agreement, with the award to reflect that fact by including additional compensation, measured by an interest factor.

## CONCLUSION

The 1894 agreement expressly provided for interest on the stated consideration. Congress granted to the Commission the power to enter an award based upon a "revision" of any agreement it found unconscionable. The Commission found the consideration paid unconscionable and it fashioned a judgment for the claimant based upon the authority Congress gave to it to make awards based on such revisions. Congress did not give the Court of Claims a review power over the exercise of the Commission's discretion in so fashioning awards. Therefore, the award is not one of interest against the United States without the consent of Congress, but an award based upon the statutory power of the Commission to exercise its discretion to enter a judgment as if an agreement were revised.

*Certiorari* should be granted and the judgment of the Court of Claims reversed.

Respectfully submitted,

CHARLES A. HOBBS
*Attorney for the Petitioner*

WILKINSON, CRAGUN & BARKER
DONALD C. GORMLEY
*Of Counsel*